

STATE OF NEW YORK
COUNTY COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK.

v

DECISION & ORDER
18-0822

LETICIA D. ASTACIO,
Defendant.

APPEARANCES:

For the People:

Barry Porsch
Special Prosecutor for Monroe County
44 W. Williams St.
Waterloo, New York 13165

For the Defendant:

Mark A. Foti, Esq.
16 West Main St.
Suite 100
Rochester, New York 14614

Defendant has moved this Court for dismissal of her Indictment on the grounds that the evidence before the Grand Jury was not legally sufficient to establish the offenses charged or any lesser included offenses. Defendant further contends that this Court does not have jurisdiction and that the Indictment is defective pursuant to CPL 210.20[1][a] and CPL 210.25[2]); that the indictment does not conform to the requirements of CPL 210.20[1][a]; that the indictment must be dismissed because Penal Law § 265.17(1) is unconstitutional; and that the grand jury proceeding was defective (CPL 210.35[5]; CPL 210.20[1][c]). The defendant further requests preclusion of any identification and preclusion of any statements not set forth in the CPL 710.30 notice. The defendant requests hearings pursuant to *Molineux* and *Sandoval*. Finally, the

defendant requests a change in venue and leave to make further motions. The People have responded to the motion and the defendant has submitted a Responding Affirmation.

The issues raised by the defendant in her omnibus motions will be addressed in the order delineated in the defendant's papers.

A. Whether the People are limited by the Bill of Particulars.

The defendant contends that the People should be held to the theory of prosecution as stated in the Bill of Particulars served on October 29, 2018; specifically that the disability referenced by Penal Law § 265.17(1) was Condition Nine in the terms and conditions of probation, that the defendant's knowledge of the disability was from the terms and conditions of probation, that the shotgun was not loaded, and that the shotgun was not a firearm as firearm is defined in the Penal Law.

Criminal Procedure Law § 200.95(8) provides,

At any time before commencement of trial, the prosecutor may, without leave of the court, serve upon defendant and file with the court an amended bill of particulars. At any time during trial, upon application of the prosecutor and with notice to the defendant and an opportunity for him to be heard, the court must, upon finding that no undue prejudice will accrue to defendant and that the prosecutor has acted in good faith, permit the prosecutor to amend the bill of particulars. Upon any amendment of the bill of particulars, the court must, upon application of defendant, order an adjournment of the proceedings or any other action it deems appropriate which may, by reason of the amendment, be necessary to accord the defendant an adequate opportunity to defend.

The Criminal Procedure Law clearly provides an opportunity for the People to amend a Bill of Particulars. That ability is not limited to the details of the prosecution but can, in certain cases, pertain to the theory of the prosecution (*see, People v Griffin*, 9 AD3d 841 [4th Dept 2004], *lv granted* 3 NY3d 713, *appeal withdrawn* 3 NY3d 754). Here, inasmuch as the People have not

amended the Bill of Particulars, any prohibition to so act would be premature and speculative and that portion of defendant's motion to preclude the People from amending the Bill of Particulars is denied. This ruling is without prejudice to the defendant and does not prevent the defendant from moving to limit the People's ability to amend the Bill of Particulars at a later date.

B. Inspection of Grand Jury Minutes.

That portion of defendant's motion seeking inspection of the Grand Jury minutes is granted. The Court has reviewed the minutes of the Grand Jury proceedings held on September 7, 2018 and, as discussed more fully below, has determined that the evidence submitted to the Grand Jury constitutes prima facie proof that the crimes charged in the subject indictment were committed by the defendant.¹ The Court further finds that the instructions to the Grand Jury were sufficient in all respects.

C. Whether the evidence presented to the grand jury was sufficient

The defendant contends that the evidence presented to the grand jury was insufficient pursuant to CPL 210.20(1)(b). In reviewing the sufficiency of the evidence presented to the grand jury, the court must view it in the light most favorable to the People (*see, People v Bello*, 92 NY2d 523, 525 [1998]). "Evidence is legally sufficient where it is 'competent' and where it, 'if accepted as true, would establish every element of an offense charged and defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent' (CPL 70.10[1]). Thus, the question is whether the evidence adduced before the grand jury, if unexplained and contradicted, would warrant conviction by a petit jury

¹The Court notes that the defendant's attorney reviewed the grand jury testimony prior to the filing of the motion.

[citations omitted]” (*People v Vieira-Suarez*, 147 AD3d 1405, 1406 [4th Dept 2017], *lv denied*, 29 NY3d 1088).

The testimony before the Grand Jury established that on April 2, 2018 the defendant requested to purchase a Maverick Model 88 twelve gauge shotgun from the Dick’s Sporting Goods store in Henrietta, Monroe County, New York. The defendant provided the salesclerk with a driver’s license. The defendant was told she could not purchase the shotgun because another Dick’s Sporting Goods location had previously denied her request to purchase a shotgun.

A deputy from the Monroe County Sheriff’s Department collected the shotgun from the Dick’s store in Henrietta. He stated that the shotgun was retrieved from an employee-only area of the store by the store manager.

The defendant’s probation officer testified that he was in possession of the original order of probation that was signed by Judge Aronson, the defendant and himself. The photocopy he had with him at the Grand Jury was a true copy of the original. He was present when the document was signed and made the copy in the course of business of the Probation Department. The defendant signed the order and conditions of probation after the terms were reviewed with her.

The defendant contends that the terms and conditions of probation do not create a “disability” within the meaning of Penal Law § 265.17(1), which provides:

“A person is guilty of criminal purchase or disposal of a weapon when: 1. Knowing that he or she is prohibited by law from possessing a firearm, rifle or shotgun because of a prior conviction or because of some other disability which would render him or her ineligible to lawfully possess a firearm, rifle or shotgun in this state, such person purchases a firearm, rifle or shotgun from another person.”

The phrase “some other disability” is not defined in the Penal Law. The defendant

contends that “disability” should be interpreted to mean “certified not suitable to possess a self-defense spray device, a rifle or shotgun” as defined in Penal Law § 265.00(16). This Court rejects that argument. Had the legislature intended “some other disability” to be the equivalent of “certified not suitable to possess a self-defense spray device, a rifle or shotgun”, it would have used that phrase. In choosing another term, the legislature clearly intended a different meaning.

The Court is persuaded by the People’s argument that “some other disability” refers to all legal disabilities. There is no reason why an individual with one type of legal disability, or prohibition from possessing a firearm, rifle or shotgun, should be treated differently from an individual with another type of legal disability. An individual who is prohibited from possessing a firearm, rifle or shotgun should be treated the same whether the prohibition is the result of a prior conviction, terms of probation, or other provision of federal or state law. Penal Law § 265.17 makes it a crime for an individual to purchase a firearm, rifle or shotgun if the individual is legally prohibited from possessing such weapon.

The defendant further contends that the conditions of probation did not prohibit the possession of an unloaded shotgun. Condition Nine of the Order and Conditions of Probation states, “Probationer shall be prohibited from possessing a firearm, dangerous weapon, or noxious substance.” The question presented here is whether the terms of the defendant’s probation rendered her ineligible from possessing a shotgun. The defendant contends that in order to find that the defendant’s conditions of probation prohibited her from possessing a shotgun, this Court must find that a shotgun, whether loaded or unloaded, constitutes a dangerous weapon.

Inasmuch as the term “dangerous weapon” is not defined in the Penal Law, the defendant urges this Court to look to the Penal Law definition of “dangerous instrument”. “Dangerous instrument,” as it is defined by Penal Law § 10.00(13), includes “any instrument * * * which,

under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” It is true, as defendant argues, that caselaw has repeatedly clarified that as the term “dangerous instrument” applies to a gun, the gun must be loaded (*People v Hall*, 50 AD3d 1467, 1468 [4th Dept 2008]; *People v Peralta*, 3 AD3d 353, 355 [1st Dept 2004]; *People v Hilton*, 147 AD2d 427, 354 [1st Dept 1989]). However, the City Court did not use the term “dangerous instrument” in drafting the conditions of probation, so it could not have meant dangerous instrument as that term is defined in the Penal Law. In choosing to use the term “dangerous weapon” rather than “dangerous instrument”, this Court determines that the City Court intended to prohibit possession of weapons of a broader category than loaded weapons. A condition of probation is valid so long as it “is sufficiently explicit to inform a reasonable person of the conduct to be avoided” (*People v Wheeler*, 99 AD3d 1168, 1171 [4th Dept 2012], quoting *People v Tucker*, 302 AD2d 752 [3d Dept 2003]). In this Court’s view, a reasonable person would understand that a shotgun, whether loaded or not, falls within the definition of a “dangerous weapon.”

No provision of the Penal Law requires Penal Law definitions to be used in writing or interpreting terms of probation; indeed, to interpret terms and conditions of probation as defendant would have the Court do, in terms of technical definitions within the Penal Law, would run afoul of the “reasonable person” standard enunciated in *Wheeler*. The terms and conditions of probation, as a general rule, are not meant for lawyers. Rather, they are meant for the (usually) lay criminal defendants to whom they are addressed. These lay defendants are generally unfamiliar with legal technicalities, and a “reasonable person” would not necessarily understand them in such terms. Thus, the terms and conditions should not be read in terms of the sometimes hyper-technical definitions found in the Penal Law. Rather, they must be read in

terms of how “a reasonable person would understand them” (*Wheeler*, 99 AD3d at 1171).

Again, this Court believes that a “reasonable person” would understand that a shotgun constitutes a “dangerous weapon.” If the City Court had intended the terms and conditions of probation to prohibit the possession of only loaded weapons, it could have referenced the terms “dangerous instrument” or “loaded weapon” as defined in the Penal Law. Unlike other Courts, which, when they have meant to point to specific Penal Law definitions, have done so explicitly (*see e.g. People v Rozario*, 20 Misc 3d 76, 81 [App Term 2008] [condition of probation explicitly referenced “school grounds, as that term is defined in Penal Law § 220.00(14)”]), the sentencing court did not.

Therefore, this Court finds that the terms of probation prohibited the defendant from possessing both loaded and unloaded weapons.

Alternatively, this Court finds that the shotgun constitutes a firearm as that term is used in the conditions of probation. Both the defendant and the People refer to the Penal Law definition of firearm² in reaching the conclusion that a shotgun is not a firearm, despite the fact that there are no Penal Law definitions for two of the three items listed in Condition Nine. Again, however, as set forth above, this Court eschews the use of hyper-technical Penal Law definitions in interpreting the conditions of defendant’s probation. This Court finds that the City Court’s use of two non-penal law terms in Conditions Nine, as well as other non-penal law terms in other of defendant’s conditions of probation (i.e. “mood-altering drug” and “contraband”), indicates that the court did not intend that Penal Law definitions apply to the terms of probation. The term firearm also has a common sense definition readily comprehensible to a “reasonable

²“Firearm” as defined in PL § 265.00(3) refers to pistols, revolvers, “sawed-off” shotguns, “sawed-off” rifles, and assault weapons.

person.” Black’s Law Dictionary defines firearm as “A weapon that expels a projectile (such as a bullet or pellets) by the combustion of gunpowder or other explosive. — Also termed gun” (Black’s Law Dictionary [10th ed 2014], firearm [note: online version]). Merriam-Webster defines firearm as “a weapon from which a shot is discharged by gunpowder —usually used of small arms” (Merriam-Webster Online Dictionary, firearm [<https://www.merriam-webster.com/dictionary/firearm>] [Note: online free version]). Using the common sense definition of firearm rather than the Penal Law definition leads to the conclusion that a shotgun is a firearm.

In sum, this Court finds that an unloaded shotgun constitutes both a dangerous weapon and a firearm pursuant to the terms of probation. Interpreting the plain meaning of the terms of probation as a whole, and specifically Condition Nine, it is clear that the defendant was prohibited from possessing all manner of guns. Any other reading would lead to bizarre results that would prohibit the defendant from possessing certain weapons while allowing her to possess others.³

The defendant further contends that the evidence before the Grand Jury was insufficient in that there was a lack of evidence that she had knowledge of the disability - that she was aware that she was prohibited from possessing a shotgun. The probation officer testified before the

³Parenthetically, even if defendant were correct that Condition Nine should be interpreted in accordance with the Penal Law definition of “dangerous instrument,” her attempt to purchase the shotgun would still support the indictment. While a person who possesses an unloaded shotgun is not guilty of criminal possession of a weapon, he or she may be guilty of attempted possession, where there is an “intent” to load it (*People v Wedgewood*, 106 A.D.2d 674, 676 [2d Dept 1984]; *see also People v Howard*, 32 Misc.3d 31, 32 [App Term 2011]). While there was no testimony that Plaintiff explicitly asked to purchase ammunition, for purposes of legal sufficiency of the evidence before the Grand Jury, her intent to load it “ ‘may be inferred from [her] conduct and the surrounding circumstances, as well as from the act itself’ ” (*People v Hull*, 125 AD3d 1099 [3d Dept 2015], *aff’d* 27 NY3d 1056 [2016]).

Grand Jury that he reviewed the terms of probation with the defendant. Viewing the evidence in the light most favorable to the People, this is sufficient evidence of the defendant's knowledge of the disability.

Finally, the defendant contends that the evidence before the Grand Jury was insufficient in that her alleged conduct did not come dangerously close to the completion of the crime as is required for an attempt. Penal Law § 110.00 provides, "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

Again, viewing the evidence in the light most favorable to the People, the defendant's conduct in going to a second location, after being denied the purchase of a weapon at the first location, and stating that she would like to purchase a shotgun is sufficient to support an indictment for Attempted Criminal Purchase or Disposal of a Weapon (Penal Law § 110.00, 265.17[1]).

D. Request for dismissal for lack of jurisdiction.

Criminal Procedure Law § 210.20(1)(a) provides, "1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that: (a) Such indictment or count is defective, within the meaning of section 210.25" Criminal Procedure Law § 210.25(2) provides, "The allegations demonstrate that the court does not have jurisdiction of the offense charged."

Based upon the determination herein that the evidence before the Grand Jury was legally sufficient to support the sole count of the Indictment, this Court finds that it has jurisdiction and the basis for such jurisdiction is sufficiently stated in the Indictment.

F. Facial sufficiency of the Indictment

The defendant contends that the Indictment is facially defective because it fails to state the disability that the defendant was under or how the defendant knew of the disability.

Criminal Procedure Law § 200.50 provides that an indictment must contain “A plain and concise factual statement in each count which, without allegations of an evidentiary nature, (a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation” (CPL 200.50[7][a]).

A review of the indictment indicates that in alleging that the defendant knew that she was prohibited from possessing a firearm, rifle or shotgun because of a disability, the indictment fully satisfied the requirements of CPL 200.50[7][a].

F. Constitutional Challenges

The defendant contends that the Penal Law § 265.17 is unconstitutional.

An indictment or count thereof is defective and must be dismissed where “The statute defining the offense charged is unconstitutional or otherwise invalid” (CPL 210.25[3]). The defendant contends that Penal Law § 265.17 is both *per se* unconstitutional and unconstitutional as applied to her. The defendant further contends that Penal Law § 265.17 is vague and is in violation of the Second Amendment.

As the Court of Appeals has stated, “An enactment of our Legislature is presumed to be valid and the heavy burden of demonstrating that a statute is unconstitutional rests with the one seeking to invalidate the statute [citations omitted]” (*People v Bright*, 71 NY2d 376, 382 [1988]). Defendant’s argument that Penal Law § 265.17 is vague because it does not provide for limitations for “prior convictions” or “disability” is without merit. The statute clearly and

definitively reads that a defendant that is legally prohibited from possessing a gun is also prohibited from purchasing or disposing of one.

This Court further finds that the defendant's claim that Penal Law § 265.17 violates the Second Amendment to the United States Constitution is without merit. "While the United States Supreme Court concluded [] that the Second Amendment confers a constitutionally protected individual right to keep and bear arms as a means of self-defense within the home, it also held that the right conferred by the Second Amendment [] is not absolute and may be limited by reasonable governmental restrictions (*see, District of Columbia v Heller*, 554 US 570, 624 [2008])" (*People v Perkins*, 62 AD3d 1160, 1161 [3d Dept 2009]).

Contrary to defendant's contention, this Court is not tasked in determining whether a condition of probation prohibiting the possession of a shotgun for someone convicted of a violation level offense violates the Second Amendment. As terms and conditions of probation can and are tailored to the individual probationer, the issue before this Court is whether the condition of probation which prohibits this defendant from possessing a shotgun violates the Second Amendment of the United States Constitution. This Court finds that it does not. With respect to the defendant's argument that Penal Law § 265.17 is unconstitutional as specifically applied to her, this Court notes that the defendant was convicted of a misdemeanor offense after a trial where the testimony indicated that she was aggravated and combative with the police officers she interacted with. She did not relay to the sentencing court any legitimate need to possess a shotgun or other weapon. The court appropriately and constitutionally restricted the defendant from possessing a shotgun.

Contrary to defendant's contentions, the sentencing court is not obligated to provide a defendant with an opportunity to be heard with regard to the terms and conditions of probation.

Furthermore, defendant exercised her right to appeal from the judgment of conviction and sentence and did not, at that time, object to Condition Nine in the terms of probation.

G. Defects in the Grand Jury Proceedings

Defendant contends that the proceedings of the grand jury were defective due to the bias of the grand jurors, the failure to properly instruct the Grand Jury and the failure to follow evidentiary rules. “A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when * * * [t]he proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result” (CPL 210.35[5]).

Defendant is correct that all of the grand jurors acknowledged knowing of the defendant although none of them knew her personally. The Grand Jurors were specifically asked to acknowledge whether they could not be fair and impartial. All of the grand jurors indicated that they could be fair and impartial. In addition, they all acknowledged that they would listen to the evidence and decide the case solely on the evidence. The Special Prosecutor went thorough and lengthy questioning of the grand jurors to assure that they would be fair and impartial. The questioning was sufficient to ensure that the integrity of the grand jury was not impaired.

The defendant contends that the Special Prosecutor impaired the integrity of the Grand Jury by failing to provide the grand jury with the definitions of “firearm” and “dangerous weapon”. As noted above, specific instructions with regard to these terms were not necessary as the Grand Jury was entitled to give these terms their ordinary and common sense meanings. “[A] Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law.” (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]).

Finally, the defendant contends that the copy of the Terms and Conditions of probation

was improperly admitted into evidence at the Grand Jury. The copy was properly admitted into evidence as the probation officer testified that he made the copy of the terms and conditions of probation, that the original was in the file and that the copy was a true and accurate copy of the original. He also testified that it was in the course of business to make the document.

H. Preclusion of Identification of the Defendant

The defendant contends that the People's failure to serve a CPL 710.30 notice with regard to any identification of the defendant requires that People be precluded from offering identification testimony at trial. Criminal Procedure Law § 710.30(1) provides,

Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him or her or a pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

The People are not precluded from offering identification testimony by a witness who has not previously identified the defendant. The denial of this portion of defendant's motion is without prejudice to renewal of the motion at the time the People offer identification testimony.

I. Preclusion of Statement

The defendant is not requesting a hearing pursuant to *People v Huntley* (15 NY2d 72 [1965]) with regard to the statements contained in the CPL 710.30 notice provided to the defendant at her arraignment. Should the People seek to offer, at a later date, statements not contained in the CPL 710.30 notice at, the defendant may make further application for preclusion.

J & K. Use of prior criminal, vicious or immoral conduct at trial.

The defendant's motion for a *Sandoval* hearing is granted will be held prior to jury selection. Pursuant to the defendant's request, the People are directed to comply with the provisions of CPL 240.30 which provides,

Upon a request by a defendant, the prosecutor shall notify the defendant of all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant. Such notification by the prosecutor shall be made immediately prior to the commencement of jury selection, except that the court may, in its discretion, order such notification and make its determination as to the admissibility for impeachment purposes of such conduct within a period of three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection.

The defendant's motion for a *Ventimiglia (Molineux)* hearing to preclude evidence of the defendant's prior uncharged criminal, vicious, or immoral conduct is also granted. The People are ordered to give notice to the defendant and the trial court of their proposed Molineux evidence at least three days prior to the scheduled trial date, excluding Saturdays, Sundays, and holidays.

L. Change of Venue

The defendant requests a change of venue stating that "the relentless, often negative pretrial publicity that has saturated the community in which the jury would be drawn." In support of her application, the defendant cites CPL 23.20(2) which provides for a procedure by which the Appellate Division may remove a case from one county to another or may expand the pool of jurors. The application is denied at this time as the defendant has made her application to the trial court rather than the appellate court.

M. Further motions

The defendant requests leave to make further motions as necessary. The defendant's motion is denied. Criminal Procedure Law § 255.20 is controlling with respect to the time frame for making pre-trial motions and there have been no allegations of good cause for making further motions outside of those time constraints.

The Court is mindful of the provisions of CPL 255.20(3) which provides, "the court must entertain and decide on its merits, at any-time1 before the end of the trial, and appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in subdivision one of this section or included within the single set of motion papers as required by subdivision two" and will entertain additional motions accordingly.

This constitutes the DECISION and ORDER of the Court.

Dated: December 13th 2018

A handwritten signature in black ink, appearing to read "W^u F Kocher", written over a horizontal line.

Hon. William F. Kocher
Acting Monroe County Court Judge